Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

MARGIE A. PICKETT,

Petitioner,

v.

PETROLEUM HELICOPTERS, INCORPORATED, EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL COMPANY, AND DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In order to be eligible for compensation benefits under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1333(b), must a worker suffer injury or death *on* an Outer Continental Shelf (OCS) stationary platform or waters above, i.e., does the OCSLA have an "On the Shelf" situs requirement?

The U.S. Fifth Circuit says YES.

The U.S. Third Circuit says NO.

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Margie Pickett, widow of Joseph Pickett, individually, and on behalf of his dependent child, Michael B. Pickett, respectfully petitions for a Writ of Certiorari to review a Judgment of the United States Court of Appeal for the Fifth Circuit in this case.

OPINIONS BELOW

The decision of the Court of Appeals on the merits (Appendix "A") is reported at 266 F.3d 36. The decision of Administrative Law Judge, Honorable Clement J. Kennington, (Appendix "C") and the Per Curiam Opinion of the Benefits Review Board of the U.S. Department of Labor (Appendix "B") addressing the question presented are unreported.

STATEMENT OF JURISDICTION

On October 25, 2001, the United States Court of Appeals for the Fifth Circuit denied the Petitioner's timely suggestion for Rehearing En Banc, and the Petition for Rehearing by the Panel. (Appendix "D"). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Outer Continental Shelf Lands Act (OCSLA) provides the following definitions at 43 U.S.C. § 1331:

When used in this subchapter —

> (1) The term "development" means those activities which take place following discovery of minerals in paying quantities, including geophysical

> activity, drilling, platform construction, and *operation of all onshore support facilities*, and which are for the purpose of ultimately producing the minerals discovered.

(emphasis ours)

and at 43 U.S.C. § 1333:

> **(b) Longshore and Harbor Workers' Compensation Act applicable; definitions**
>
> With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the Outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the Outer Continental shelf, compensation shall be payable under the provisions of the Longshore and Harbor Workers' Compensation Act [33 U.S.C.A. § 901, *et seq.*]. For the purposes of the extension of the provisions of the Longshore and Harbor Workers' Compensation Act under this section —
>
> (1) the term "employee" does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof;

(2) the term "employer" means an employer any of whose employees are employed in such operations; and

(3) the term "United States" when used in a geographical sense includes the Outer Continental Shelf and artificial islands and fixed structures thereon.

STATEMENT OF THE CASE

Pilot, Joseph Pickett, was killed on November 15, 1990 as he lifted helicopter N3536T from a heliport landing pad at Petroleum Helicopters, Inc. (PHI's) Cameron, Louisiana onshore support facility. The helicopter at an altitude of 25 to 30 feet rolled to the right, crashed into the parking lot, ejecting Pickett, who was struck by the rotor blades, causing instant death. Pickett had just commenced a regular voyage for his employer, PHI, who had contracted with Amerada Hess Corporation to provide helicopter transportation of personnel and supplies from the Hess shoreside base, located a short distance away on the banks of Calcasieu River, to numerous stationary platforms located on the Outer Continental Shelf (OCS) used by Hess for the purpose of exploring for, developing, and recovering of the natural resources from the subsoil and seabed of the OCS.

After liftoff from the onshore beach-side PHI heliport, the Outer Continental Shelf (OCS) is only three miles away. Thus, Pickett spent at least 90% of his employment *on* the Outer Continental Shelf. On days when he flew directly offshore, his employment would be at least 99% on the OCS and 1% on land or in State waters. He was truly an offshore lands worker.

Claim was timely filed by Joseph Pickett's widow, Margie Pickett, and her children, for Longshore Workers' Compensation benefits as made applicable by the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(3)(b). Pickett's employer chose to pay (lesser) benefits under the Louisiana Workers' Compensation Act (LWCA), L.R.S. 23:1021, *et seq.*

The Honorable Clement J. Kennington, Administrative Law Judge, denied survivor benefits, finding the Fifth Circuit U.S. Court of Appeals' decision in *Mills v. Director OWCP*, 877 F.2d 356 (5th Cir. 1989), required that Pickett's death occur *on* the OCS.

Confronted with prior expressions from the Fifth Circuit Court to the contrary dealing with fatal helicopter crashes, he said:

> Although the Court (5th Cir.), in *Mills*, stated that it did not reverse its prior decisions in *Barger v. Petroleum Helicopters, Inc.*, 692 F.2d 337 (5th Cir. 1982) or *Stansbury v. Sikorski Aircraft*, 681 F.2d 948 (5th Cir.), cert. denied sub nom. *Stansbury v. Chevron U.S.A., Inc.*, 459 U.S. 1089 (1982), the effect of its holding was to overrule said decisions. *Id.* at 361. In *Barger*, the Fifth Circuit read the Act, as extended by the OCSLA, as providing an exclusive remedy for the death of a helicopter pilot who regularly engaged in transporting oilfield workers and equipment to an offshore rig on the OCS. 629 F.2d at 338. In *Stansbury*, the Court held 43 U.S.C. §1333(3)(b) "to apply to injuries occurring as a result of the operations described without regard

to the physical situs of the injury." 681 F.2d at 950 (citing *Nations v. Morris*, 483 F.2d 577, 584 (5th Cir. 1973), cer.. denied, 414 U.S. 1071 (1973)). Furthermore, the fifth Circuit stated in *Herb's Welding v. Gray* that they had "adopted a 'but for' test of causation in determining whether a particular injury was the result of operations on the shelf." 766 F.2d 898, 900 (5th Cir. 1985) (citing *Barger*, 692 F.2d at 340; *Stansbury*, 681 F.2d at 951). Coverage applied based on the fact that Claimant would not have been injured "but for" the extractive operations on the shelf. *Herb's Welding*, 766 F.2d at 900.

While this case is certainly distinguishable from *Mills* in that Claimant, unlike the one in *Mills*, performed a substantial amount of his work over water and indeed worked on the OCS, and was thus routinely exposed to the perils of the sea, nonetheless, I am still compelled to follow the Fifth Circuit's holding, which excludes Claimant from coverage as he was over land, albeit rather fortuitously, when the accident occurred. 877 F.2d 356.

The Benefits Review Board concurred.

Petitioner timely appealed to the United States Court of Appeals for the Fifth Circuit (which had jurisdiction pursuant to 33 U.S.C. § 921(c)) and urged the Court to fashion a rule defining an "Offshore Lands Worker" as one whose duties require a substantial presence on the Outer Continental Shelf conducting operations for the purpose of exploring for, developing, removing, recovering of the national resources

from the subsoil and seabed of the OCS. The reasons advanced were (1) this is what plain language of the OCSLA says; and (2) "Offshore Lands Workers" are entitled to the same consideration as afforded maritime seamen in that they should not walk in and out of coverage. Once they acquire eligibility (status), they keep it for the entirety of their employment. *See Offshore Company v. Robinson*, 266 F.2d 779, and *Barrett v. Chevron*, 781 F.2d 1067.

The Fifth Circuit Per Curiam Opinion reaffirmed its position in *Mills*, *supra*, requiring "the injury to occur on the OCS," and "satisfaction of the situs test, even as to helicopter crashes."

Petitioner's Petition for En Banc Rehearing received no votes.

REASONS FOR GRANTING THE WRIT

I.

THERE IS A DIRECT CONFLICT BETWEEN THE THIRD AND FIFTH CIRCUITS.

In *Curtis v. Schlumberger Offshore Service, Inc.*, 849 F.2d 805 (3d Cir. 1988), Curtis, a well logging operator who worked offshore New Jersey on the Outer Continental Shelf on the NEW ERA, a semi-submersible drilling rig exploring for oil and gas, was called in to his employer's Rhode Island headquarters. Upon arriving, he was immediately ordered to return offshore. During the early morning hours, he was driving in a company automobile to Atlantic City to meet a helicopter which was to fly him offshore when he was

seriously injured in a head-on collision. Judge Hutchinson opined as follows:

> The only criterion . . . is for injured employees to be involved in "any operations conducted on the Outer Continental Shelf . . . ."

He further noted that Curtis was:

> within the scope of his employment at the time he was injured,
>
> and
>
> "But for" his traveling to the NEW ERA for the purpose of conducting "operations" within §1333(b), employee Curtis would not have sustained injuries in the automobile accident.

Thus, Curtis was granted Worker's Compensation benefits under the OCSLA. The Third Circuit's view is the plain language of the statute has no situs requirement that injury occur on the shelf.

On the other hand, the Fifth Circuit in Petitioner's (Pickett) case followed its decision in *Mills*, *supra*, which "plainly requires satisfaction of the situs test, even as to helicopter crashes," and "allows OCSLA coverage only for employees who suffer injury or death on an OCS platform or the waters above the OCS."

II.

THE PLAIN LANGUAGE OF CONGRESS IN THE OCSLA IS INCONSISTENT WITH THE FIFTH CIRCUIT SITUS REQUIREMENT.

Eligibility for benefits under the U.S. Longshore and Harbor Workers' Compensation Act, 43 U.S.C. § 902, *et seq.* ("LHWCA") is governed as follows:

> § 903. Coverage
>
> (A) Disability or death; injuries *occurring upon navigable waters* of United States.
>
> Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of any employee, but only if the disability or death results from an injury *occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel.)* **(Emphasis ours)**

From this language, the Supreme Court, beginning in *Northeast Marine Terminal Company, Inc. v. Caputo, et al.*, 97 S. Ct. 2348, 432 U.S. 248 (1977), *for Longshore Cases*, fashioned its status test (engaged in maritime employment) and situs test (occurring upon navigable waters including, etc.) The origin of the situs requirement is Congressional language which clearly requires injury "*upon* navigable waters."

On the other hand, Congress said in the OCSLA (43 U.S.C. § 1333(b)):

> With respect to disability or death of an employee resulting from any *injury occurring as a result of operations conducted on the Outer Continental Shelf* for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the Outer Continental Shelf, compensation shall be payable under the provisions of the Longshore and Harbor Workers' Compensation Act (33 U.S.C.A. 901 et seq.).

(Emphasis ours)

Congress could have *rearranged the above language* and said:

> With respect to disability or death of an employee resulting from any *injury occurring on the Outer Continental Shelf* as the result of ***operations*** conducted for the purpose of exploring for, etc.

If Congress had done this, they would have established a situs requirement (injury or death must occur on the OCS) as they did for Longshoremen . . . but they chose not to do so. Rather, Congress clearly said the injury must occur "as a result of *operations* conducted on the . . . shelf." Thus, we must seek the meaning of "***operations***."

Congress provided at 43 U.S.C. § 1331 Definitions as follows:

> When used in this subchapter —
>
> > (1) The term "development" means those activities which take place following discovery of minerals in paying quantities, including geophysical activity, drilling, platform construction, and *operation of all onshore support facilities*, and which are for the purpose of ultimately producing the minerals discovered.

(Emphasis ours)

Since Pickett was injured in the "operation of an onshore support facility," necessary for oil development on the OCS, the plain language of Congress makes him eligible for Worker's Compensation benefits.

It is fashionable in these times to be ever mindful of judicial responsibility to follow the plain language of Congress. *See Norfolk Shipbuilding and Drydock Corp. v. Garvis*, 121 S. Ct. 1927 (2001). Unfortunately for the Pickett family, the Fifth Circuit has fallen behind.

III.

OFFSHORE LANDS WORKERS SHOULD NOT WALK INTO AND OUT OF COVERAGE.

In *Chandris, Inc., et al. v. Antonios Latsis*, 94-325 (1995) 515 U.S. 347, 115 S. Ct. 2172, 132 L. Ed. 2d 314, 63 USLW 4564, 1995 AMC 1840, this Court said:

> We believe it is important to avoid "engrafting upon the statutory classification of a 'seaman' a judicial gloss so protean, elusive, or arbitrary as to permit a worker to walk into and out of coverage in the course of his regular duties." *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067, 1075 (CA5 1986) (en banc) (quoting *Longmire v. Sea Drilling Corp.*, 610 F.2d 1342, 1347, n. 6 (CA5 1980)). Thus, a worker may not oscillate back and forth between Jones Act coverage and other remedies depending on the activity in which the worker has engaged while injured. *Reeves v. Mobile Dredging & Pumping Co.*, 26 F.3d 1247, 1256 (CA3 1994).

A cardinal principle of maritime seaman status cases is once the test is met, the eligible seaman carries his eligibility even when off the vessel on land so long as the seaman is in the course and scope of his employment.

Thus, the critical question is "why afford a different standard to an Offshore Lands Worker who spends 90% of his time on the OCS and 10% at the land bases?" What is the reasoning that causes him to loose eligibility when his work caused him to not be physically present on the Outer Continental Shelf for 10% of the time? There can be none.

The OCSLA contains no language suggesting departure from the rule enunciated by Justice O'Conner in *Chandris*, *supra*.

43 U.S.C. § 1333(b) of the Outer Continental Shelf Lands Act (OCSLA) also provides as follows:

> (1) the term "employee" does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof; and
>
> (2) the term "employer" means an employer any of whose employees are employed in such operations.

Under the plain language of Congress, PHI meets the definition of "employer" because it provided helicopter transportation of personnel and supplies for *operations conducted* on the Outer Continental Shelf for developing and removing of the natural resources from the subsoil and seabed of the Outer Continental Shelf, and Pilot Pickett meets the definition of "employee" because he was not a seaman and was "employed in *such operations*."

IV.

NATIONAL IMPORTANCE

Thousands of Offshore Lands workers who begin operations from onshore support bases of the Fifth Circuit (Texas, Louisiana, and Mississippi) are engaged in a dangerous activity. Many suffer injury. They reside on their "days off" with their families throughout the United States, as well as Canada and Mexico. Pilot Pickett was a long-time resident of Colorado. Thus, the implications of the failure of the Fifth Circuit to follow plain Congressional language affects many Americans. Fortunately for the states of the Fifth Circuit, most United States offshore oil development begins from bases there located. Unfortunately, these Offshore Lands workers and their families, under the law as interpreted by the Fifth Circuit, are denied "equal protection" guaranteed by the United States Constitution.

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED SEPTEMBER 28, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 00-60795

MARGIE A. PICKETT (WIDOW OF JOSEPH PICKETT),

Petitioner,

VERSUS

PETROLEUM HELICOPTERS, INC.;
EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL COMPANY;
DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

Petition for Review of a Decision of the Benefits Review Board

Before JONES, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:

Margie Pickett appeals a decision of the Benefits Review Board ("BRB") that she does not qualify for death benefits regarding her late husband, Joseph Pickett, under the Longshore and Harbor Workers' Compensation Act

("LHWCA"), as adopted in the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1333(b). We affirm.

I.

Joseph Pickett was a helicopter pilot for Petroleum Helicopters, Inc., performing contract services for Amerada Hess Corporation. He ferried workers and equipment between land and offshore platforms. He was killed when his helicopter crashed over land during a test flight.[1]

Margie Pickett filed for benefits under the OCSLA. An administrative law judge ruled Pickett ineligible under OCSLA because his death did not occur over the Outer Continental Shelf ("OCS") and thus did not satisfy this court's situs requirement for OCSLA benefits.[2] Margie Pickett appealed to the BRB, which affirmed.

II.

Margie Pickett concedes that the death did not occur over the OCS but argues that the plain language of OCSLA is inconsistent with this court's situs requirement. Whatever the merits of Pickett's statutory argument, however, we are bound by *Mills v. Director, OWCP*, 877 F.2d 356, 362 (5th

---

1. If the flight test had been successful, the helicopter would have landed, boarded passengers, and ferried the passengers to oil platforms on the OCS.

2. Pickett also sought benefits under the LHWCA. The administrative law judge found — and Margie Pickett does not dispute — that her husband failed to meet the status requirement of the act.

Cir. 1989) (en banc), which allows OCSLA coverage only for employees who "(1) suffer injury or death on an OCS platform or the waters above the OCS; and (2) satisfy the 'but for' status test this court described in *Herb's Welding v. Gray*, 766 F.2d 898, 900 (5th Cir. 1985)." *Accord Sisson v. Davis & Sons*, 131 F.3d 555, 558 (5th Cir. 1998).

Margie Pickett argues that *Mills* is factually distinct and that our earlier decisions therefore should control. We disagree. The relevant language in *Mills* is not fact-specific, but categorically requires the injury to occur on the OCS. In fact, the court discussed the two cases on which Margie Pickett relies:

> The Director argues that we imposed no situs requirement for § 1333(b) coverage in *Barger v. Petroleum Helicopters, Inc.*, 692 F.2d 337 (5th Cir. 1982), and *Stansbury v. Sikorski Aircraft*, 681 F.2d 948 (5th Cir. [1982]) . . . . The Director's reliance on those cases is misplaced.
>
> *Barger* and *Stansbury* held that § 1333(b) extended the LHWCA as the sole remedy for survivors suing the employers of individuals who (1) satisfied the "but for" status test; and (2) died in helicopter crashes on the high seas above the OCS. Although some of the dicta in those opinions may be overly broad, we have no quarrel with those holdings to the extent they grant LHWCA benefits to oilfield workers injured on waters above the OCS. We do not interpret those cases to read § 1333(b) as extending LHWCA benefits

> to oilfield workers injured on land or state territorial waters. *But cf. Curtis v. Schlumberger Offshore Service, Inc.*, 849 F.2d 805 (3d Cir. 1988) (Section 1333(b) covers OCS platform worker injured in car accident on New Jersey Garden State Parkway while driving to meet helicopter that would have flown him to rig).

Mills, 877 F.2d at 361-62. Contrary to Margie Pickett's suggestion, *Mills* plainly requires satisfaction of the situs test, even as to helicopter crashes.

Moreover, Margie Pickett's second contention — that we should follow *Curtis* because "the Court's opinion in *Mills* . . . did not disagree with *Curtis*" — is unpersuasive. *Mills* referenced *Curtis* only as "authority [that] cites a proposition analogous to the contrary of the main proposition." THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2(c), at 23 (Columbia Law Review Ass'n et al. eds., 17th ed. 2000).

AFFIRMED.

APPENDIX B — PER CURIAM DECISION AND ORDER OF THE UNITED STATES DEPARTMENT OF LABOR BENEFITS REVIEW BOARD DATED OCTOBER 31, 2000

U.S. Department of Labor
Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 00-0288

MARCIE A. PICKETT
(Widow of JOSEPH PICKETT)

Claimant-Petitioner

v.

PETROLEUM HELICOPTERS, INCORPORATED

and

EMPLOYERS INSURANCE OF WAUSAU,
A MUTUAL COMPANY

Employer/Carrier-Respondents

DATE ISSUED: OCT 31 2000

DECISION and ORDER

Appeal of the Decision and Order of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

* * *

Appendix B

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (99-LHC-1301) of Administrative Law Judge Clement J. Kennington denying benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §1331 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant's husband (decedent) was a helicopter pilot for employer. Employer provides helicopter transportation to offshore oil rigs on the outer continental shelf (OCS). Decedent was performing an operational flight check when his helicopter crashed into the employee parking lot from an altitude of 30 feet. Decedent sustained fatal injuries as he was ejected from the helicopter and struck by the blades. Claimant is receiving death benefits under the Louisiana workers' compensation statute, and sought death benefits under the Act, 33 U.S.C. §909.

Following the *en banc* decision of the United States Court of Appeals for the Fifth Circuit in *Mills v. Director, OWCP*, 877 F.2d 356, 22 BRBS 97(CRT) (5th Cir. 1989), the

administrative law judge found that decedent's death is not covered under the OCSLA as the situs of the death was not on the OCS itself. Claimant appeals this finding, and employer responds, urging affirmance.[1]

In *Mills*, the court held that the OCSLA applies to those who "suffer injury or death on an OCS platform or the waters above the OCS" and who "satisfy the 'but for' status test this court described in *Herb's Welding, Inc. v. Gray*, 766 F.2d 898, 900 (5th Cir. 1985)," *Mills*, 877 F.2d at 362, 22 BRBS at 102(CRT), *i.e.*, the injury or death would not have occurred "but for" the extractive operations on the shelf. The claimant in *Mills* suffered an injury during construction of an oil production platform destined for the OCS. The injury occurred in the employer's yard in Amelia, Louisiana. The court held that the claimant could not recover under the OCS, as the "situs" requirement of the OCSLA was not met. The court distinguished its decisions in *Barger v. Petroleum Helicopters, Inc.*, 692 F.2d 337 (5th Cir. 1982), *cert. denied*, 461 U.S. 958 (1983), and *Stansbury v. Sikorski Aircraft*, 681 F.2d 948 (5th Cir.), *cert. denied*, 459 U.S. 1089 (1982), as in those cases the employees died in helicopter crashes on the high seas over the OCS. As the deaths did not occur on land, and thus were not subject to state workers' compensation laws, the Fifth Circuit held that the decisions did not preclude the result it announced in *Mills*.[2] The *Mills* court reviewed

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1. The administrative law judge also found that there is no coverage under the Longshore Act. *See* 33 U.S.C. §§902(3), 903(a). This finding is not appealed.

2. The court did state that *Barger* and *Stansbury* contained "overly broad" *dicta*. *See* discussion, *infra*.

legislative history and case law decided on other issues involving the OCS, and determined that the federal remedy of the OCSLA is not available to those who have a state workers' compensation remedy. *Mills*, 877 F.2d at 362, 22 BRBS at 102(CRT).

The Fifth Circuit more recently addressed its *Mills* decision in *Sisson v. Davis & Sons, Inc.*, 131 F.3d 555, 31 BRBS 199(CRT) (5th Cir. 1998). The claimant in *Sisson* was injured while constructing a guard rail around an employee parking lot at a heliport. The heliport was used for transporting workers and equipment to rigs on the OCS. The court first affirmed the administrative law judge's finding that claimant's injury did not occur on a situs covered under the Longshore Act, 33 U.S.C. §903(a). The court then summarily rejected the contention that claimant was covered under the OCSLA. The court stated:

> Sisson also claims coverage under the OCSLA, 43 U.S.C. § 1333(b). *Mills v. Director, OWCP*, 877 F.2d 356 (5th Cir. 1989) held that an employee had to be injured on the Outer Continental Shelf to obtain LHWCA benefits through the OCSLA. Sisson concedes that he was not so injured. *Mills* forecloses OCSLA relief for Sisson.

131 F.3d at 557, 31 BRBS at 201(CRT).

In contrast, in a decision issued before the *en banc* decision in *Mills*, the United States Court of Appeals for the Third Circuit held that a claimant, injured on a highway in New Jersey on his way to a heliport to be transported to the

OCS, was covered under the OCSLA. The court rejected a situs requirement for OCSLA coverage, and imposed only a "but for" test: would the claimant have sustained injuries "but for" the operations on the shelf. Holding that he would not have, the claimant was found covered. *Curtis v. Schlumberger Offshore Service, Inc.*, 849 F.2d 805, 21 BRBS 61(CRT) (3d Cir. 1988).

Claimant contends that the reasoning of *Curtis* should be applied to find coverage in this case, inasmuch as the facts of *Mills* and *Sisson* are distinguishable, and therefore the holdings therein are inapplicable. Claimant states that the claimants in *Mills* and *Sisson* never left their land-based employment, whereas her husband regularly flew over the OCS and landed on rigs on the OCS like the claimant in *Curtis*. Claimant hinges her argument on this language from *Mills*:

> *Barger* and *Stansbury* held that §1333(b) extended the LHWCA as the sole remedy for survivors suing the employers of individuals who (1) satisfied the "but for" status test; and (2) died in helicopter crashes on the high seas above the OCS. Although some of the dicta in those opinions may be overly broad, we have no quarrel with those holdings to the extent they grant LHWCA benefits to oilfield workers injured on waters above the OCS. We do not interpret those cases to read §1333(b) as extending LHWCA benefits to oilfield workers injured on land or state territorial waters. *But cf. Curtis v. Schlumberger Offshore Service, Inc.*, 849 F.2d 805 (3d Cir.1988) (Section 1333(b) covers

Appendix B

> OCS platform worker injured in car accident on New Jersey Garden State Parkway while driving to meet helicopter that would have flown him to rig).

Mills, 877 F.2d at 361-362, 22 BRBS at 102(CRT). Claimant thus contends that the Fifth Circuit did not disagree with *Curtis* on the issue of OCSLA coverage for one who regularly uses helicopter transportation to the OCS, and that the administrative law judge's decision therefore should be reversed.

We reject claimant's argument and affirm the administrative law judge's denial of benefits, as his finding that decedent's death is not covered under the OCSLA is supported by the law of the Fifth Circuit, which is controlling in the instant case. In *Stansbury*, the Fifth Circuit addressed a widow's entitlement to benefits under the OCSLA for the death of her husband in a helicopter crash into the waters over the OCS.[3] The court stated, "We have construed [the OCSLA] to apply to injuries occurring as a result of the operations described without regard to the physical situs of the injury." *Stansbury*, 681 F.2d at 950 (citations omitted). In both *Stansbury* and *Barger*, the court focused solely on the "but for" test, and found it satisfied in that the employees' deaths in helicopter crashes in the waters over the OCS would not have occurred but for the extractive operations on the OCS. The language quoted above from *Stansbury* concerning the absence of a situs test is clearly the *dicta* the *Mills* court

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3. In both *Stansbury* and *Barger*, the claimants also attempted to recover under the Jones Act, but the helicopters were held not to be "vessels."

referred to as being overbroad; the employees in both *Stansbury* and *Barger* were killed in the waters over the shelf, so there was no need to state that the physical situs of the injury is not relevant. Although the *Mills* court did not expressly state its disagreement with *Curtis*, and merely noted its opposite holding, claimant herein reads too much into this method of citation. With regard to the "situs" requirement of the OCSLA, *Mills* specifically states that the holdings in *Barger* and *Stansbury* are limited to finding OCSLA coverage for "those oilfield workers injured on waters above the OCS." *Mills*, 877 F.2d at 361, 22 BRBS at 102(CRT). The court definitively held that the Act does not extend to those oilfield workers injured on land or in state territorial waters. *Id.*, 877 F.2d at 362, 22 BRBS at 102(CRT). As it is undisputed that decedent's death occurred on land, *Mills* forecloses claimant's recovery under the Act irrespective of the fact that decedent regularly flew over the OCS and landed on rigs on the OCS.[4] *See Sisson*, 131 F.3d at 557, 31 BRBS at 201(CRT).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

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4. Claimant apparently has a remedy under state law, and the court in *Mills* stated that "As the legislative history makes plain, Congress enacted OCSLA only as a vehicle to fill voids in the rules governing the federally managed territory of the OCS. No such void exists for disputes encompassing areas already governed by state law." 877 F.2d at 359, 22 BRBS at 99(CRT).

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SO ORDERED.

s/ Roy P. Smith
ROY P. SMITH
Administrative Appeals Judge

s/ Regina C. McGranery
REGINA C. McGRANERY
Administrative Appeals Judge

s/ Malcolm D. Nelson
MALCOLM D. NELSON, Acting
Administrative Appeals Judge

APPENDIX C — DECISION AND ORDER DENYING BENEFITS OF THE UNITED STATES DEPARTMENT OF LABOR DATED NOVEMBER 15, 1999

U.S. Department of Labor
Office of Administrative Law Judges
Heritage Plaza Bldg. – Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

DATE: November 15, 1999

Case No. 1999-LHC-1301

OWCP No. 7-133441

In the Matter of
JOSEPH PICKETT (DECEASED)

Claimant

v.

PETROLEUM HELICOPTERS, INC.

Employer

EMPLOYER INS. OF WAUSAU
A MUTUAL COMPANY

Carrier

* * *

Appendix C

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (hereinafter "the Act"), 33 U.S.C. § 901, et seq., through the Outer Continental Shelf Lands Act (hereinafter "OCSLA"), 43 U.S.C.A. 1333(3)(b), brought by Margie A. Pickett, the widow of deceased employee Joseph Pickett (hereinafter "Claimant"), against Petroleum Helicopters Inc. (hereinafter "PHI") and Employer Insurance of Wausau A Mutual Company (hereinafter "Carrier"). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on October 6, 1999, at Lafayette, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant and Employer testified and introduced eight joint exhibits, which were admitted into evidence (marked JTX-A, B, & C, and D-1 through D-5), including a photographic map of the PHI's Cameron Heliport, which is 500 hundred yards off of the Gulf of Mexico, and the Amerada Hess Heliport, which is adjacent to the Calcasieu River which merges with the lake Charles Ship Channel.[1]

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1. References to the transcript and exhibits are as follows: trial transcript – TR__; Joint exhibits – JTX-__.

Appendix C

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. At all times pertinent herein, PHI a heliport in Cameron, Louisiana, as shown on JTX-A. JTX-B, is a photograph of the PHI Heliport in Cameron, Louisiana. The PHI Heliport is located approximately 500 yards from the Gulf of Mexico. The PHI Heliport has one parking lot, a building used as a gathering center with offices for dispatchers, a shop for tools, supplies for mechanics to maintain the helicopters, and fuel tanks. JTX-C is a photograph of PHI landing pads and helicopters at Cameron. From its heliport, PHI provided helicopter transportation of personnel and supplies for operations conducted on the Outer Continental Shelf (hereinafter "OCS") for the purposes of exploring for, developing, and removing of the natural resources from the subsoil and seabed of the OCS. Additionally, no loading, unloading, repairing or building of vessels is conducted at the PHI base in Cameron.

2. At all times pertinent herein, Amerada Hess Corporation (hereinafter "Hess") maintained a dockside facility in Cameron, Louisiana, adjacent to the East Fork of Calcasieu Pass, a navigable stream, as shown on JTX-A. JTX D-1 through D-5 are photographs of the Hess facility, which has

a dock used by supply vessels, a crane for loading and unloading vessels, office buildings, warehouses, radio towers, and a parking lot. The Hess facility is used by Hess to load and unload vessels in order to conduct its operations on the OCS for the purpose of exploring for, developing, and removing of the natural resources from the subsoil and seabed of the OCS. JTX D-3 & D-3 show parts of the Hess Heliport. Hess had contracted with PHI to have PHI provide helicopter services to transport supplies and personnel for Hess operations conducted on the OCS, where Hess explores for, develops, and removes natural resources from the subsoil and seabed of the OCS. From time to time, PHI used the Hess Heliport in connection with the helicopter services PHI was providing to Hess.

3. The PHI and Hess bases in Cameron facilitated Hess' operations conducted on the OCS, where Hess explores for, develops, and removes natural resources from the subsoil and seabed of the OCS.

4. On November 19, 1990, PHI employee Joseph B. Pickett was the pilot in command of helicopter N3536T. On this date, Pickett lifted his helicopter from a landing pad at PHI's Cameron heliport, intending to perform an operational check flight of the aircraft. Such an operational check flight is required by regulation after maintenance has been performed on the helicopter. Passengers may not be carried in the helicopter until the check flight has been successfully completed. Had the helicopter performed satisfactorily, Pickett intended to fly to the Hess Heliport to pick up personnel and supplies to be transported to Hess fixed offshore platforms on the OCS.

5. Pickett had served PHI for many years in similar piloting operations. Said operations involved either flying between two land points, flying between land and a fixed offshore platform, or flying between two offshore platforms.

6. On November 19, 1990, Pickett lifted the helicopter from the ground in order to perform the operational check flight, but the helicopter did not perform as expected and began to slowly roll to the right. At an approximate altitude of 25 to 30 feet, the helicopter N3536T pointed downward and descended, impacting the ground on its right side, and coming to rest about 175 feet from the point of takeoff in PHI's employee parking lot. Joseph Pickett was ejected and struck by the helicopter blades; thereby sustaining fatal injuries.

7. At the time of his death, Joseph Pickett was lawfully married to and living with his wife, Margie A. Pickett, and one minor child, Michael B. Pickett, born May 5, 1973.

8. During the 52 weeks immediately prior to his death, Joseph Pickett earned $38,004.78, equaling an average weekly wage of $730.86. This figure includes a one time company wide bonus, which was awarded in July 1990 and consisted of an extra two weeks pay. Excluding this bonus from the above figure, Mr. Pickett's gross earnings for the 52 weeks prior to his death totaled $36,679.04, equaling an average weekly wage of $705.37.

9. To date, Wausau Insurance Companies (hereinafter "Wausau") has paid benefits under the Louisiana Workers' Compensation Act (hereinafter "LWCA") as follows:

$119,504.46 in death benefits, $3,000 in funeral expenses and $1,745.82 in medical expenses. Margie Pickett currently receives death benefits under LWCA in the amount of $218.28 a month.

10. Margie A. Pickett claims that benefits should have been paid under 43 U.S.C.A 1333(3)(b) (OCSLA), or 33 U.S.C.A. 901 et seq., (LHWCA).

II. ISSUES

The sole unresolved issue presented by the parties is whether Claimant's injury, which occurred at PHI facility located in the State of Louisiana, is covered by either the Act or OCSLA. (TR 11).

III. STATEMENT OF THE CASE

A. Chronology:

In the issue at hand, Margie A Pickett made a claim for benefits under the Act and OCSLA on behalf of her deceased husband, Joseph Pickett (Claimant). As set for in the stipulations Claimant was employed by PHI as a pilot in command of a helicopter M3536T (TR 9). He was married to Margie A. Pickett with one dependant child, Michael B. Pickett, at the time of his death. On November 19, 1990, Claimant lifted the helicopter from a landing pad at PHI's Cameron Heliport, with the intent of preforming an operational check flight of the aircraft (TR 9). However, the helicopter malfunctioned and crashed to the ground on the PHI base. Claimant was ejected from the helicopter and then struck by the helicopter blades, resulting in a fatal injury (TR 10).

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B. Contention of the Parties

Here I am faced with a relatively simple factual but more complicated legal issue of whether a claimant may satisfy the requirements of the Act, and more specifically OCSLA, by simply suffering an injury on land in preparation for the transport of personnel and supplies to fixed offshore platforms on the OCS. Claimant's widow contends that she is entitled to compensation for death benefits under the Act and OCSLA and that coverage commenced as soon as Claimant began his operational check flight. Employer contends that Claimant's accident is not covered under either the Act or OCSLA because the situs of the accident was at PHI's base located in Louisiana and not the OCS as required under the Act and OCSLA.

IV. DISCUSSION

A. Purposes of the Act

The general purpose of the Act is to aid longshoremen by minimizing the need for litigation to secure compensation for their injuries. *Reed v. S. S. Yaka*, 373 U.S. 410, 415 (1963); *Rodriguez v. Compass Shipping Co. Ltd.*, 451 U.S. 596, 616-17 (1981). The Act is designed to ensure that covered workers are fairly and promptly compensated for claims arising out of their employment. *Donovan v. Washington Metropolitan Area Transit Authority*, 614 F. Supp. 1419, 1420 (D. D.C. 1985), *affd.* 796 F.2d 481 (D.C. Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987); *Vilanova v. United States*, 625 F. Supp. 651, 654 (D.P.R. 1986), *affd in part without op. and vacated on other grounds in part without op.*, 802 F.2d 440 (1st Cir.

1986), *reaff'd*, 851 F.2d 1 (1st Cir. 1988), *cert. denied*, 488 U.S. 1016 (1989) (a fundamental purpose of the Act is to provide employees with a practical and expeditious remedy and at same time to limit economic burden on employers by providing that liability under Act shall be exclusive of all other liability); *Marsala v. Triple A South*, 14 BRBS 39 (1981) (the fundamental intent of the Act is to compensate employees for loss of wage-earning capacity attributable to employment-related injury). The Act has historically been liberally construed in favor of employees. *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *Baltimore & Philadelphia S.B. Co. v. Norton*, 284 U.S. 408, 414 (1932); *Harbor Marine Contracting Co. v. Lowe*, 152 F.2d 845, 847 (2d Cir. 1945), *cert. denied*, 328 U.S. 837 (1946); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 268 (1977). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of a claimant when the evidence is evenly balanced, violates § 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), which specifies that the proponent of a rule or position has the burden of proof. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994), *aff'g* 990 F.2d 730 (3rd Cir. 1993).

B. Jurisdiction

For a claim to be covered by the Act, a claimant must establish that his injury occurred upon the navigable waters of the United States, including any dry dock, or that his injury occurred on a landward area covered by Section 3(a) and that his work is maritime in nature, and not specifically excluded by the Act. 33 U.S.C. §§902(3), 903(a); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297,

15 BRBS 62 (CRT) (1983); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Thus, in order to demonstrate that jurisdiction exists, a claimant must satisfy the "situs" and the "status" requirements of the Act. *Id.* In *Perini*, the Supreme Court held that when a worker is injured on actual navigable waters while in the course of his employment on those waters, he is a maritime employee under Section 2(3). 459 U.S. 297. Regardless of the nature of the work being performed, such a claimant satisfies both the situs and status requirements and is covered under the Act, unless he is specifically excluded from coverage by another statutory provision. *Perini*, 459 U.S. at 323-24. *See also Crapanzano v. Rice Mohawk, U.S. Construction Company, Ltd.*, 30 BRBS 81 (1996); *Nelson v. Guy F. Atkinson Construction Co.*, BRBS 39 (1995) *affd mem. sub nom. Nelson v. Director, OWCP*, No. 95-70333 (9th Cir. Nov. 13, 1996); *Johnsen v. Orfanos Contractors, Inc.*, 25 BRBS 329 (1992). The situs test limits the geographic coverage of the Act, while the status test is an occupational concept that focuses on the nature of the worker's activities. *Bienvenu v. Texaco, Inc.*, 164 F.3d 901 (5th Cir. 1999) (en banc).

As a geographical test, situs demands that a longshoreman be injured within a specified area to be covered under the Act. *Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 222 (4th Cir. 1998). The definition of situs in the Act includes navigable waters, and "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer" in the shipbuilding process. 33 U.S.C. § 903(a). In dealing with claims under OCSLA, the Fifth Circuit has interpreted situs, and hence

coverage, to extend only to accidents or injuries occurring on the OCS. When injuries occur elsewhere they are not covered under OCSLA. *Mills v. Director, OWCP*, 877 F.2d 356 (5th Cir. 1989). Thus, for a claimant to recover under either the Act or OCSLA his accident or injury must occur either in an area defined by 33 U.S.C. § 903(a) or on the OCS.

Although the Court, in *Mills*, stated that it did not reverse its prior decisions in *Barger v. Petroleum Helicopters, Inc.*, 692 F.2d 337 (5th Cir. 1982) or *Stansbury v. Sikorski Aircraft*, 681 F.2d 948 (5th Cir.), *cert. denied sub nom. Stansbury v. Chevron U.S.A., Inc.*, 459 U.S. 1089 (1982), the effect of its holding was to overrule said decisions. *Id.* at 361. In *Barger*, the Fifth Circuit read the Act, as extended by the OCSLA, as providing an exclusive remedy for the death of a helicopter pilot who regularly engaged in transporting oilfield workers and equipment to an offshore rig on the OCS. 629 F.2d at 338. In *Stansbury*, the Court held 43 U.S.C. § 1333(3)(b) "to apply to injuries occurring as a result of the operations described without regard to the physical situs of the injury." 681 F.2d at 950 (citing *Nations v. Morris*, 483 F.2d 577, 584 (5th Cir. 1973), *cert. denied*, 414 U.S. 1071 (1973)). Furthermore, the Fifth Circuit stated in *Herb's Welding v. Gray* that they had "adopted a 'but for' test of causation in determining whether a particular injury was the result of operations on the shelf." 766 F.2d 898, 900 (5th Cir.) (1985) (citing *Barger*, 692 F.2d at 340; *Stansbury*, 681 F.2d at 951). Coverage applied based on the fact that Claimant would not have been injured "but for" the extractive operations on the shelf. *Herb's Welding*, 766 F.2d at 900.

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While this case is certainly distinguishable from *Mills* in that Claimant, unlike the one in *Mills*, performed a substantial amount of his work over water and indeed worked on the OCS, and was thus routinely exposed to the perils of the sea, nonetheless, I am still compelled to follow the Fifth's Circuit's holding, which excludes Claimant from coverage as he was over land, albeit rather fortuitously, when the accident occurred. 877 F.2d 356.

Claimant cites the Third Circuit case of *Curtis v. Schlumberger Offshore Service, Inc.*, which would support Claimant's contention that coverage began when Joseph Pickett stepped into the helicopter. 849 F.2d 805 (3rd Cir. 1988). In *Curtis*, the Claimant was injured while driving from employer's headquarters to Atlantic City, New Jersey to be helicoptered back to the rig. *Id.* Similarly, in the issue at hand, Claimant was in the process of performing his typical duties as a helicopter pilot for employer, when the helicopter crashed and resulted in fatal injuries. Claimant argues that OCSLA' s statutory language is unambiguous in its lack of situs requirement because it reads to extend coverage to employees who are "injured as the result of operations conducted on the [OCS] . . . for the purpose of . . . developing . . . the natural resources . . . of . . . the [OCS]." *Offshore Logistics, Inc. v. Tallentine*, 477 U.S. 207 (1986); *Department of the Navy, Military Sealift Command v. FLRA*, 836 F.2d 1409, 1416 (3rd Cir. 1988). The absence of any geographical limitations in subsection (b) constitutes a justifiable reason to not place such a limit on subsection (b). While *Curtis* provides strong reasons for coverage in this case, I find nonetheless that I am bound by the Fifth's Circuit's decision in *Mills* inasmuch as the accident and proceeding occurred in the 5th Circuit. 877 F.2d 356.

Since OCSLA does not provide coverage, the question remains as to whether the Act otherwise provides coverage for Claimant's injury. In order to establish coverage under the Act Claimant again must establish an appropriate situs. The Fifth Circuit has held in accord with congressional purpose that a site can satisfy the requirements of the Act as long as it is close to or in the vicinity of navigable waters and is customarily used in loading, unloading, repairing a vessel. *See* 33 U.S.C. § 903(a). However, in *Sisson v. Davis & Sons, Inc.*, 131 F.3d 555, 557, 558 (5th Cir. 1998) the Fifth Circuit held that a parking lot constructed at a heliport to transport personnel to offshore platforms was not a situs customarily used to load vessels because neither fixed platforms nor helicopters were vessels and thus did not satisfy the situs requirement of the Act. In this case the situs of the injury is similar to *Sisson* and compels a finding of no coverage because it was not site customarily used to load, unload, repair or build vessels.

C. Conclusion

In conclusion, I find that Employer is not responsible to Margie A. Pickett, on behalf of decedent Joseph Pickett, for compensation pursuant to the LHWCA through the OCSLA for death benefits as a result of fatal injuries suffered to Claimant when the helicopter he was piloting crashed to the ground on employer's premises because the situs of the accident was neither on the OCS nor at a location customarily used to load, unload, repair or build vessels. Obviously, the significance of situs and how situs is defined is of paramount importance in determining whether coverage exists. Under Fifth Circuit precedent Claimant cannot establish coverage

because of a lack of proper situs. While coverage could certainly be found under the Third Circuit's ruling in *Curtis*, both the injury and the proceedings took place in Louisiana within the Fifth Circuit's jurisdiction mandating application of Fifth Circuit precedent.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law and the record in its entirety, I enter the following order:

Claimant, Margie A Pickett's claim on behalf of decedent, Joseph Pickett, for benefits pursuant to the Act via the OCSLA is **DENIED**.

ORDERED this 15th day of November 1999, at Metairie, Louisiana.

s/ Clement J. Kennington
CLEMENT J. KENNINGTON
Administrative Law Judge

APPENDIX D — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED OCTOBER 25, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-60795

MARGIE A PICKETT,
(Widow of Joseph Pickett)

Petitioner

v.

PETROLEUM HELICOPTERS INCORPORATED; EMPLOYERS INSURANCE OF WAUSAU, A Mutual Company; DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, US DEPARTMENT OF LABOR

Respondents

Petition for Review of an Order of the
Benefits Review Board

ON PETITION FOR REHEARING EN BANC
(Opinion September 28, 2001, 5 Cir., __, __ F.3d __)

Before JONES, SMITH and DeMOSS, Circuit Judges.

Appendix D

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

* * *

ENTERED FOR THE COURT:

s/ [illegible]
United States Circuit Judge